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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT TODD MORSE, Defendant and Appellant.	C086129 (Super. Ct. No. 62142813)

After a jury found defendant Robert Todd Morse guilty of nine counts of lewd acts on a child under age 14 against three victims, D., Ke., and K., and one count of forcible rape, against D., the trial court sentenced him to serve six years plus 90 years to life. He appeals, contending: (1) the prosecutor committed misconduct by arguing the presumption of innocence was over; (2) the trial court abused its discretion in denying severance of the charges as to D. from the charges as to Ke. and K.; (3) the trial court abused its discretion in admitting evidence regarding uncharged sexual offenses against D.; and (4) there was insufficient evidence to support the conviction as to one of the

counts of lewd acts as against K. The claim of prosecutorial misconduct is forfeited by defendant's failure to object and counsel's failure to object was not ineffective assistance. As to defendant's other claims, the trial court did not abuse its discretion in denying severance or admitting evidence of uncharged acts, and there was sufficient evidence supporting the conviction. We affirm.

BACKGROUND

In 2015, after a program at school, K. told one of her teachers she had been inappropriately touched and fondled when she was younger. She wanted advice on whether she should tell her parents. The teacher reported the allegations. As a result of this report, Sergeant Brandon Bean investigated the matter. During the course of investigating, Bean learned defendant also molested K.'s older sister, Ke. Bean ran a full background check on defendant and learned defendant had a prior conviction from New York for sexual offenses committed against his niece, D. Bean spoke with D. in 2015 and learned defendant had also committed crimes against D. in 1989 or 1990 in California that had never been reported.

D.'s Testimony

D. lived in New York. In 1989 or 1990, when she was 12 years old, she visited her grandmother in California. On this trip, defendant raped her for the first time. While at her grandmother's home, D. slept on the sectional couch in the living room. Everyone in the house went to bed except defendant, who was still in the living room with D. He passed her a note asking if she had ever had intercourse. She answered she did not know what that was. After passing more notes, she left the room to change. When she returned to the living room, defendant was watching a pornographic movie. She turned the movie off. The next thing D. remembered, she was on the couch, defendant had climbed on top of her, and put his penis in her vagina. As she was crying,

he put his fingers on her lips, and promised her it would not hurt. It was a few years before D. saw defendant again.

Later, defendant lived in New York, about 30 minutes away from D.'s home. She would see him regularly at family gatherings and holidays. During this time, defendant forced D. to have sex with him on multiple occasions. This included when she would spend the night at defendant's girlfriend's house after babysitting for them. He would come into her bedroom in the middle of the night and have sex with her. He also forced her to have sex at her 14th or 15th birthday party. At that party, they were riding four wheelers in a field, D. ended upon the ground with no one else around. Defendant took her pants down, put his penis in her vagina, and "pleasured himself."

When D. was 16 years old, defendant raped her again. The day before the rape, he had asked her to stay home from school and she refused because she knew he intended to have sex with her, as he had on many other occasions. When she got home from school, she heard the door open and panicked, because she knew what was going to happen. He came to her bedroom, started kissing her, fondling her breasts, and undressed her. She resisted and told him to stop, but he did not. He pushed her down on the bed and orally copulated her, then he removed his pants and put his penis in her vagina. He pulled his penis out, ejaculated on her stomach, got dressed and left. He told her not to say anything. D.'s boyfriend called her shortly after defendant had left and she told him what happened. She also told her parents and called the police. As a result of this assault, defendant was convicted of sexual abuse in the first degree in New York.

Defendant acknowledged he lived in California in 1989 and 1990 when D. came to visit his mother, her grandmother. He remembered D. visiting, but denied he had ever asked her to watch a movie or had sexual intercourse with her in California. He admitted he had sexual intercourse with her a couple of times later in New York, but denied he had

forced her to have sex. He claimed she first initiated sex with him by orally copulating him after she babysat his son.

Ke. & K.

Ke. and K.'s aunt[1] and her live-in boyfriend, defendant, babysat the sisters after school and during the day in summer. Although they did not call him uncle, they viewed the relationship with him as an uncle. When Ke. was between 9 and 14 years old and K. was between 6 and 10 years old, they would go to defendant's house after school and would be there for a couple of hours. During summer, K. would spend full days there. The home had a pool and defendant would swim with Ke., K., and their cousin.

Defendant repeatedly molested both Ke. and K. in the pool. When Ke. was between 10 and 12 years old, defendant regularly grabbed her breasts from behind her when they were in the pool. In the pool, he pulled her against him from behind and put his hands down her shorts, touched her vagina, and rubbed her clitoris. He also came up behind her and grabbed and pinched her butt. Ke. estimated the molestations occurred once or twice a week in the summer over the course of a few summers.

Defendant also repeatedly molested K. in the pool. Once, when she was eight or nine years old, defendant was wearing goggles in the pool, defendant swam under the water and moved K.'s bathing suit bottom to look at her vagina. She felt him hook his finger under the band of her bathing suit and move it. His head was approximately 18 inches away from her vagina. The cousin was also in the pool, but was swimming around so he did not see this happen. Another time, when K. was around the same age, defendant held her floating on her back, and positioned K. with her legs over the side of

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[1] The aunt was Ke. and K.'s stepmother's sister.

the pool and the jet of the pool streaming onto her vagina. He asked her if it felt good. She answered no and swam away. Defendant also threw K. in the pool. Before throwing her, he positioned her on his lap in such a way she could feel the pressure of his penis against her bottom and his hands lingered on her bottom.

Defendant molested K. and Ke. on other occasions in the home. One time while K. was playing a Game Boy in the cousin's bedroom, defendant came in the room, standing behind her, he started rubbing K.'s arms and shoulders, then put his fingers in her shirt and lifted it to look down her shirt. Defendant would also walk by Ke. in the house, and grab her butt and "stuff like that," a lot.

Defendant used a vibrator with both K. and Ke. When Ke. was 12 or 13 years old, her aunt had left to take her boys to a soccer game and left Ke. with defendant at the house. Ke. fell asleep on the couch. She woke up with defendant next to her, touching her on her genitals, and rubbing her vagina and clitoris under her pants. She told him to stop and he told her, "Shut up, you know you like it." He went into his bedroom, got a sex toy and came back with a vibrator with a remote control attached to it. It was small, oval shaped, and pink or purple. He was kneeling in front of her, put the vibrator down her pants, turned it on, and kept moving it up and down. He did not stop until he heard footsteps coming up the stairs as her aunt, K., and the cousin came home. She did not tell anyone because she did not think they would believe her, particularly because at that time her aunt always thought she was lying. When K. was between 8 and 10 years old, during a game of hide and seek, while K. was hiding in a chair with her lower back exposed, defendant came up behind her and put a silver small bullet shaped vibrator against her lower back, just above the crack of her buttocks. He moved it side to side across her back. She told him to go away because she was hiding.

During his investigation, Bean found defendant's driver's license alongside various sex toys in a chest of drawers in defendant's bedroom. Specifically, there was a

silver "bullet" vibrator attached to a remote control. There was also a rubbery purple item that could be placed over the vibrator.

When she was in 6th or 7th grade (between 2005 and 2007), Ke. told her friend, T., that she had been touched inappropriately. Years after the molestation, Ke. also told her mother about it. In 2013, K. told the cousin defendant had touched her inappropriately. Although they were close, the sisters never told each other what defendant had done.

In the middle of her freshman year in high school, Ke. moved out of town to live with her mother. K. stopped going to defendant's house because of the molestation when she was in 7th or 8th grade.

Defendant acknowledged he threw the children in the pool from his knee with his hand on their bottom, but denied there was any sexual intent. He denied ever moving K.'s bathing suit bottom to look at her vagina or positioning her with the water jet hitting her vagina. He denied ever touching Ke.'s breasts in the pool, putting his hands in her shorts or grabbing her butt. He denied putting his hands in K.'s shirt and looking at her breasts, stating his hands were too big to fit down a "little kid's shirt." He admitted he had put a massager on K.'s back, not a vibrator, in a playful way to "make her jump." He acknowledged he kept sex toys in a bedroom drawer, but denied ever touching Ke. with it or showing it to her.

DISCUSSION

I

Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct by misstating the presumption of innocence in closing argument. Recognizing defense counsel did not object to this argument, he also argues counsel was ineffective.

Background

Prior to closing argument, the trial court orally instructed the jury on the presumption of innocence. The court instructed the jury: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (CALCRIM No. 220.)

The trial court also instructed the jury that if any of "the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (CALCRIM No. 200.)

The prosecutor twice discussed the presumption of innocence in her closing argument. First, in discussing defendant's testimony, "[L]et me start by saying this: The burden of proof in this case, like in every single courtroom across this country, rests squarely on the prosecution. [¶] He is presumed innocent unless and until he is proven

guilty beyond a reasonable doubt. But that doesn't mean that his statements and when he testifies as a witness, he gets treated any differently than any other witness."

At the end of her closing argument, after arguing the testimony of the three victims who independently disclosed and told their stories, the corroborating evidence, the defendant's testimony, and the elements of the charges and how the evidence met those elements, the prosecutor argued: "The presumption of innocence is the cornerstone of our criminal justice system. It applies to every criminal case in the entire United States and it is an important one. But what I will remind you, now that we're getting at the end of this case, is that that presumption of innocence doesn't only protect innocent people. Guilty people are presumed, at the start of the case, innocent, too. We have removed that cloak. You get to see and determine for yourselves what lies beneath. He demanded a trial, like every person in the United States does, and we gave him that. [Ke.], [K.], and [D.], and law enforcement did their jobs. Now, I'm asking you to do yours." Defense counsel did not object to this statement.

In defense counsel's closing argument, he repeatedly argued it was the People's burden to prove defendant guilty beyond a reasonable doubt. He argued, "I'm not asking you to find my client innocent. It's not what we're here to do. They have a burden to prove my client is guilty beyond a reasonable doubt. It's not your job to find him innocent. It's your job to determine whether the People have evidence to meet their burden before you convict my client." And, again later, defense counsel argued, "[I]t's your duty to ensure that the People have proven beyond a reasonable doubt the charges against my client. [¶] Again, as I stated before, I'm not telling you that my client is innocent. I'm not saying that he is pure as the driven snow. . . . [¶] . . . You have to use the standard beyond a reasonable doubt and hold the People to that standard, and I assert to you that they have not met their burden and that you need to find my client not guilty."

In her rebuttal closing argument, the prosecutor reiterated it was the People's burden to prove the charges beyond a reasonable doubt and asked the jury to look at the court's instructions and the evidence to do their job in deliberating.

The trial court also provided the jury with written copies of the instructions previously given. This packet of instructions also included CALCRIM No. 220 on the presumption of innocence and reasonable doubt, and CALCRIM No. 200 that the jury should follow the trial court's instructions over any conflicting statements by the attorneys.

Analysis

" ' "To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." ' " (*People v. Charles* (2015) 61 Cal.4th 308, 327, quoting *People v. Linton* (2013) 56 Cal.4th 1146, 1205.) Defendant's trial attorney failed to preserve the issues of prosecutorial misconduct by not objecting or requesting the jury be admonished as to any claimed instance of misconduct.

Recognizing the forfeiture problem, defendant argues his counsel was ineffective for failing to object. " 'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) To establish ineffective assistance of counsel, defendant must show, by a preponderance of the evidence, that " '(1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' " (*People v. Johnson* (2015) 60 Cal.4th 966, 980.)

In evaluating an ineffective assistance of counsel claim on appeal, we presume, absent defendant's contrary showing, that " ' "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." ' [Citations.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was " 'no conceivable tactical purpose' " for counsel's act or omission. [Citations.]' '[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one' . . . [citations], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.' [Citation.]" (*Centeno*, *supra*, 60 Cal.4th at p. 675.)

"A defendant is presumed innocent until proven guilty, and the government has the burden to prove guilt, beyond a reasonable doubt, as to each element of each charged offense. [Citations.]" (*People v. Booker* (2011) 51 Cal.4th 141, 185 (*Booker*).) That "presumption of innocence continues not only during the taking of the testimony, but during the deliberations of the jury, and until they reach a verdict." (*People v. Arlington* (1900) 131 Cal. 231, 235.)

It is misconduct to misinform the jury that the presumption of innocence is "gone" prior to the jury's deliberations. (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159 (*Cowan*).) Defendant relies on *People v. Dowdell* (2014) 227 Cal.App.4th 1388 (*Dowdell*) and *Cowan* to support his claim that the prosecutor's argument fell afoul of this rule. In *Dowdell*, the prosecutor twice argued the presumption of innocence had ended. The prosecutor initially argued the evidence was overwhelming, defendant had a fair trial, the jury had the evidence, and the presumption of innocence was over. The prosecutor later argued it was "fairly obvious" the defendant had committed the crimes he was accused of and again stated, " 'The presumption of innocence is over.' "

(*Dowdell*, at p. 1407.) The court held this was prosecutorial misconduct as the statements, particularly the second one, did not focus on the strength of the prosecution's evidence, but suggested the presumption of innocence was over before jury deliberations had begun. (*Id.* at p. 1408.) In *Cowan*, the prosecutor told the jury that "the presumption of innocence is in place 'only when the charges are read' and that the 'presumption is gone' thereafter." (*Cowan, supra*, 8 Cal.App.5th at p. 1159.) The court in *Cowan* held that arguing the presumption of innocence ended even before evidence was presented at trial was an improper attempt by the prosecutor to lighten the People's burden of proof. (*Id.* at p. 1160.)

By contrast, a prosecutor does not misstate the law by arguing the evidence presented at trial has rebutted the presumption of innocence. (*Booker, supra*, 51 Cal.4th at p. 183; *People v. Panah* (2005) 35 Cal.4th 395, 463 (*Panah*); *People v. Goldberg* (1984) 161 Cal.App.3d 170, 189 (*Goldberg*).) In *Booker*, the prosecutor argued, "The defendant was presumed innocent until the contrary was shown. That presumption should have left many days ago. He doesn't stay presumed innocent." (*Booker*, at p. 183.) The prosecutor later argued, "the defendant starts out with the presumption of innocence. That doesn't stay. That isn't an automatic thing forever. That's why we have a trial. Once the evidence convinces you he is no longer innocent, that presumption vanishes." (*Id.* at p. 184.) The California Supreme Court held that these arguments did not impermissibly misstate the prosecutor's burden but the arguments merely suggested the jury should convict based on the evidence presented at trial. (*Id.* at p. 185.)

In *Goldberg*, the prosecutor argued, "And before this trial started, you were told there is a presumption of innocence, and that is true, but once the evidence is complete, once you've heard this case, once the case has been proven to you—and that's the stage we're at now—the case has been proved to you beyond any reasonable doubt. I mean, it's overwhelming. There is no more presumption of innocence. Defendant Goldberg

has been proven guilty by the evidence." (*Goldberg, supra,* 161 Cal.App.3d at p. 189.) The Court of Appeal held these statements were merely a rhetorical restatement of the law that a defendant is presumed innocent until the contrary is proven. (*Ibid.*)

In *Panah* the prosecution argued the evidence had "stripped away" defendant's presumption of innocence. (*Panah, supra,* 35 Cal.4th at p. 463.) The California Supreme Court held this argument was proper argument that in the prosecutor's opinion, the evidence proved defendant's guilt and overcame the presumption of innocence. (*Ibid.*)

In *People v. Romo* (2016) 248 Cal.App.4th 682 (*Romo*), the prosecutor argued, "As the evidence comes in—and the evidence has come in—and when you walk into that jury room and discuss the case—discuss the evidence in this case, once the evidence proved to you beyond a reasonable doubt that [defendant] committed the crime, there's no presumption of innocence. It's—it goes away as the evidence comes in and the evidence shows you that he's guilty. The presumption of innocence doesn't just stay there forever. [¶] The evidence proves to you that he's committed the crime and is guilty beyond a reasonable doubt." (*Id.* at pp. 690–691.) The court held, like in *Booker, supra,* 51 Cal.4th 141 and *Goldberg, supra* 161 Cal.App.3d 170, this argument simply argued the jury should convict based on the state of the evidence presented. (*Romo,* at p. 692.)

Defense counsel did not render constitutionally inadequate representation by failing to object to the prosecutor's remark on the presumption of innocence. "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. [S]he has the right to fully state [her] views as to what the evidence shows and to urge whatever conclusions [s]he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) The prosecutor's argument here did reference the presumption of innocence attaching at the start of the trial. However, the argument also suggested the presumption's "cloak" of

innocence had been removed by the prosecution's evidence, the victims' testimony, and law enforcement authorities' investigation. The prosecutor did not argue the presumption ended with the reading of the charges as occurred in *Cowan, supra*, 8 Cal.App.5th 1152; and she did not argue the presumption was completely over as happened in *Dowdell, supra,* 227 Cal.App.4th 1388. Considered in context, it was not unreasonable for defense counsel to interpret this argument as not all that different from those arguments found permissible in *Panah*, *Booker, Goldberg*, and *Romo.* That is, not as an incorrect statement of the law, but rather "merely a rhetorical statement about the weight of the evidence of guilt." (*Panah, supra,* 35 Cal.4th at p. 463.)

Defense counsel might not have objected because he reasonably concluded the prosecutor's statements regarding the presumption of innocence and burden of proof were not improper. Unlike *Centeno,* where our Supreme Court found defense counsel constitutionally ineffective for failing to object because "the problems with the prosecutor's comments were not difficult to discern" (*Centeno, supra*, 60 Cal.4th at p. 675), the purported impropriety of the prosecutor's statements is not so clear in this case.

Moreover, "[o]nce an otherwise properly-instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless they, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt." (*Goldberg, supra*, 161 Cal.App.3d at pp. 189–190.) The prosecutor's alleged misstatement of law was brief and was countered by other correct statements of law at the beginning of her closing argument, as well as her statements to the jury regarding the People's burden of proof. Defense counsel also argued the People had the burden of proof beyond a reasonable doubt. Before argument, the trial court thoroughly and accurately instructed the jury on the presumption of innocence and advised the jurors they must follow the law as the trial court explained it,

even if an attorney's comments conflicted and the court gave the jury written instructions after argument.

Given the uncertainty that the prosecutor's argument crossed the line into an improper argument, and the numerous correct statements of the law provided to the jury by the prosecutor, defense counsel, and the trial court, it is not inconceivable or unreasonable that defense counsel made a tactical decision to withhold his objection, preferring instead to correct the impression the jurors may have drawn from the prosecutor's apparent misstatement in his own argument, rather than drawing attention to the point by objecting. We cannot agree with defendants either that there was "no conceivable tactical purpose" for counsel's silence during the prosecutor's closing argument. Accordingly, we conclude defense counsel's lack of objection to the prosecutor's arguments concerning the presumption of innocence and burden of proof fell well within the wide range of professional competence that is deemed constitutionally effective. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

II

Severance

Defendant contends the trial court prejudicially erred by denying his motion to sever the counts related to D. (counts 12 and 13) from the counts related to Ke. and K. He argues the evidence in the cases was not cross-admissible; the offenses against D. were remote and dissimilar from the charges against the sisters; the charges as to D. were likely to inflame the jury against defendant, as they involved forcible sexual intercourse with defendant's 12-year-old niece; and two weak cases were joined with each other, creating a risk the jury would improperly aggregate the evidence against defendant.

"When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in

denying the defendant's severance motion. [Citations.] In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. [Citation.] The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 160–161.) " 'The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence.' [Citations.]" (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221.) "The burden is on the defendant to establish that the countervailing considerations of efficiency and judicial economy are outweighed by a substantial danger of undue prejudice. [Citation.]" (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1433.)

"If the evidence underlying the joined charges would have been cross-admissible at hypothetical separate trials, 'that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges.' [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 38 (*Merriman*).) If the offenses are cross-admissible, then we may affirm a court's ruling denying a severance motion without considering the remaining factors. (*Id.* at pp. 42–43.)

Here, the evidence underlying the charges related to D. were cross-admissible in the case related to Ke. and K. under Evidence Code section 1108.[2] The charges related to

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[2] Undesignated statutory references are to the Evidence Code.

Ke. and K. were cross-admissible in the case related to D. because of the independent corroboration requirement of Penal Code section 803, subdivision (f).

Section 1108

Generally, evidence of prior criminal acts is inadmissible to prove the defendant's conduct on a specific occasion. (§ 1101, subd. (a); see also *People v. Cole* (2004) 33 Cal.4th 1158, 1194.) In a criminal action where the defendant is charged with a sexual offense, however, evidence of the defendant's commission of other sexual offenses is admissible to prove the defendant's propensity to commit crimes of a sexual nature if such evidence is not inadmissible under section 352. (§ 1108, subd. (a); *People v. Christensen* (2014) 229 Cal.App.4th 781, 795–796.)

Evidence of the defendant's commission of other sexual offenses should be excluded under section 352 "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) In making this section 352 assessment relative to other sexual offenses, the trial court must weigh " 'such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]' [Citation.]" (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 823–824.) With these principles in mind, we conclude that evidence of defendant's commission of sexual assaults against D. would have been cross-admissible in separate trials of the charges for sexually molesting Ke. and K.

Defendant contends the offenses against D. were too dissimilar to the charged crimes against Ke. and K. to be admissible. " ' "[T]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under . . . section 1101, otherwise . . . section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." ' [Citation.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 133.) Moreover, there were significant similarities between the offenses. All of the girls were under 13 years of age when defendant first sexually molested them. All of the incidents involved defendant molesting a child who was defenseless and particularly vulnerable to his conduct because he was the only adult with them. As a result of his established relationships of trust and familiarity with the victims' family members, he had access to each of the victims in the privacy of a family member's home. At times he had access to the victims as a result of babysitting arrangements. He introduced the subject of sex and sexual conduct with the victims. He used sexual paraphernalia or pornography and vibrators with the victims. And the assaults and molestations occurred over the course of years. "These similarities permitted the inference that defendant had a propensity to commit such sex offenses, including the charged crimes. [Citation.]" (*Id.* at pp. 133-134.) " 'This circumstance brings the evidence precisely within the primary purpose behind . . . section 1108.' [Citation.]" (*Ibid.*)

Nor are we persuaded by defendant's claim that the prior sexual offenses against D. were too remote. " 'No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible.' [Citation.] ' "[S]ubstantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses. [Citation.]" [Citation.]' " (*People v. Robertson* (2012) 208 Cal.App.4th 965, 992.) "Numerous cases have upheld admission pursuant to . . . section 1108 of prior sexual crimes that occurred decades before the current offenses."

(*Id*. at p. 992 [no error in admitting 34–year–old prior sexual assault conviction]; see also *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [sex crime committed 23 years before current crime was admissible]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284 (*Branch*) [upholding admission of a sex crime committed 30 years before charged offense]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 ["20 years is not too remote" under section 1108].) "Defendant does not point to any evidence that his character changed over the relevant time period or offer any reason that such a change might have occurred." (*People v. Cordova, supra*, 62 Cal.4th at p. 133.)

We also reject defendant's claim the evidence was unduly prejudicial under section 352. The evidence was harmful to defendant, but it was not prejudicial in the sense it would confuse the jury or cause it to decide the case on an improper basis. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 806.) Although the incidents involving D. were more aggravated than those involving Ke. and K., the incidents involving Ke. and K. were not insignificant, and involved repeated molestations that continued over the course of years. It is not likely that cross-admitting the evidence would have confused, misled, or distracted the jury. The evidence relating to both sets of charges was straightforward. Each of the girls was able to clearly, simply, and succinctly describe the nature of defendant's assaults. The salient facts establishing the assault in each of those incidents were presented by a single witness.

Corroboration under Penal Code Section 803

In addition, the evidence related to Ke. and K. was admissible in the case related to D. as independent corroborating evidence. The offenses against D. were committed beyond the period of the statute of limitations. However, Penal Code section 803, subdivision (f), permits the charging of certain sexual offenses after the expiration of the statute of limitations if specific conditions are pled and proven, including if "there is independent evidence that clearly and convincingly corroborates the victim's allegation."

(Pen. Code, § 803, subd. (f)(2)(C).) Here, the prosecution alleged in the information that this independent corroboration requirement was met by the acts committed against Ke. and K., as well as defendant's prior conviction for sexual abuse against D.

Evidence of uncharged acts against other victims is admissible to corroborate a victim's allegation of sexual abuse under Penal Code section 803, subdivision (f). (*People v. Yovanov* (1999) 69 Cal.App.4th 392; *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 682.) This corroboration may be established "solely with evidence of a similar offense committed against an uncharged victim." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 659.) As delineated, *ante*, the offenses as against Ke. and K. were sufficiently similar to those committed against D. to make them admissible to establish the independent corroboration requirement of Penal Code section 803, subdivision (f). All of these crimes were sex offenses committed against young girls of similar age at one of their relative's homes. Accordingly, the evidence of acts against Ke. and K. was cross-admissible to establish the charges committed against D.

Evidence of the sexual assaults from the two groups of charges would have been cross-admissible in separate trials. Because the evidence underlying the charges related to D. was cross-admissible in the case related to Ke. and K. under section 1108 and the charges related to Ke. and K. were cross-admissible in the case related to D. under the corroboration requirement of Penal Code section 803, subdivision (f), the trial court did not abuse its discretion in denying defendant's motion to sever. (*Merriman, supra,* 60 Cal.4th at pp. 42-43.)

III

Admission of Uncharged New York Offenses under Section 1108

Defendant contends the trial court prejudicially erred in allowing admission of his sexual offenses against D. committed in New York, including his 1994 conviction for sexual abuse of D., and violated his federal constitutional rights by admitting evidence of

uncharged offenses. He argues although the evidence met the threshold admissibility requirements under section 1108, the evidence was unduly prejudicial and thus, had a severe risk of confusing the issues and misleading the jury. He claims the New York offenses were much more inflammatory than the other offenses, given that they involved sexual intercourse with a biological relative, were remote in time, and were dissimilar to the charged offenses.

Background

The prosecution moved in limine to admit defendant's 1994 prior conviction from New York, as well as D.'s testimony that: (1) defendant had sex with her in June of 1993, the act that led to the New York conviction; (2) defendant had sex when she was 13 or 14 years old, when they were in New York four wheeling near her home; and (3) defendant would have sex with her when she would stay at his home. Defense counsel objected to this evidence being admitted.

Following argument, the trial court ruled: "All right. So the Court feels – I am going to permit the prosecution to introduce evidence from [D.] of what happened in 1993 and also what happened in 1990. I think it's relevant under 1108 for propensity evidence. I think the fact that [D.] was approximately the same age as [Ke.] and [K.], I think is similarity. So I believe under 352 it has relevance for propensity. And so accordingly, I'm going to – having weighed and considered under 352, I am going to permit the People to have her testify.

"I further am going to permit the People to introduce [the certified conviction] as evidence. However, I am going to ask the People, unless it's relevant for some other purpose, to redact all the charges he was indicted for. I understand the People are worried that the jurors may feel that has some bearing on her credibility, but the fact is that the relevance of this [conviction] is that he was convicted of that particular offense."

Analysis

Much of the analysis and legal standards for admitting evidence under section 1108 are detailed *ante*. "Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion." (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

Under section 1108, "prior sexual offense is indisputably relevant in a prosecution for another sexual offense." (*Branch, supra,* 91 Cal.App.4th at p. 282.) The probative value, " 'in a given case will depend on innumerable considerations, including the similarity of the prior acts to the acts charged [citation], the closeness in time of the prior acts to the charged acts [citation], the frequency of the prior acts, the presence or lack of intervening events [citation], and the need for evidence beyond the testimony of the defendant and alleged victim.' [Citation.]" (*People v. Soto* (1998) 64 Cal.App.4th 966, 989–990.)

The evidence of the uncharged offenses was highly probative in that it tended to show defendant is predisposed to engage in the charged conduct and had a sexual attraction to young girls. (*People v. Holford* (2012) 203 Cal.App.4th 155, 185-186.)

The uncharged acts in New York and the conviction involved repeated incidents of defendant having sex with D. when she was between the ages of 12 and 16. The charged offenses here were forcible rape of D. when she was 12 years old, and numerous acts of lewd and lascivious conduct against Ke. and K., when they were between 8 and 13 years old. That lewd and lascivious conduct included grabbing their breasts, touching their genitals with his fingers, using a vibrator with each of them, and positioning K. with her vagina in front of the pool jet stream. Thus, in the charged and uncharged offenses, the victims were all young females, in approximately the same age range when defendant molested them. In the charged and uncharged offenses, defendant took advantage of his

relationships with family members of the victims to gain access to them when no other adult was present.

The charged offense against D. occurred in 1990 and the uncharged offenses occurred in between then and 1993. As to D., the uncharged offenses are not remote in time to the charged offenses. And, although the charged offenses against Ke. and K. occurred many years after the uncharged offenses that occurred between approximately 2005 and 2009, as discussed *ante*, 25 years between sexual offenses is not too remote.

Nor are the uncharged offenses unduly prejudicial. The charged and uncharged offenses against D. all involved defendant having sexual intercourse with D. The uncharged rapes in New York in 1990 were not more inflammatory than the charged rape. In addition, the fact defendant was convicted of forcibly sexually abusing D. in New York reduced its prejudicial effect, as it eliminated the risk the jury would seek to punish defendant for that crime in this proceeding, the jury could confuse the issues, or the matter would require a "mini-trial." (*People v. Loy* (2011) 52 Cal.4th 46, 61.) And, as above, the evidence related to the uncharged offenses was straightforward and presented with the testimony of D. and the certified copy of conviction. The similarities between the uncharged and charged offenses balances out the remoteness. (*Branch, supra*, 91 Cal.App.4th at p. 285.)

Defendant "has failed to carry his burden of rebutting the strong presumption of admissibility of the sexual assault crimes evidence under . . . section 1108." (*Merriman, supra*, 60 Cal.4th at p. 42.) The admission of evidence of the uncharged offenses against D. and the conviction for forcible sexual abuse against D. was not an abuse of discretion. (*People v. Holford, supra*, 203 Cal.App.4th at p. 186.) Because the probative value of this evidence was not substantially outweighed by the danger of undue prejudice, or any other statutory counterweight contained in section 352, we also conclude admission of

the evidence did not violate defendant's federal constitutional rights. (*Holford,* at p. 180; *Branch, supra,* 91 Cal.App.4th at pp. 283-284.)

IV

Cumulative Error

Defendant contends these claimed errors were cumulatively prejudicial. We have rejected defendant's claims of error. Thus, there is no prejudice to cumulate, and we reject this contention as well. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.)

V

Sufficiency of the Evidence

Defendant contends there is insufficient evidence to support the conviction for lewd and lascivious conduct based on him moving the bottom of K.'s bathing suit to look at her vagina.[3] He claims there is not sufficient evidence he "actually made contact with K.'s body during this incident," therefore the conviction must be reversed.

" 'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077.)
" 'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his [or her] guilt beyond a reasonable doubt.' [Citation.]" (*People v. Bean* (1988) 46 Cal.3d 919, 932–933.) "[U]nless the testimony is physically impossible or inherently

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[3] Two incidents were charged in the pool relating to K., moving her bathing suit and placing her against the water jet. The parties agree the bathing suit incident is most likely count one. Irrespective of which count is challenged, the substantive issue on appeal, and corresponding analysis, remain the same.

improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Penal Code section 288(a) has two elements: (a) the touching of an underage child's body (b) with a sexual intent. (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) "However, the form, manner, or nature of the offending act is not otherwise restricted. Conviction under the statute has never depended upon contact with the bare skin or 'private parts' of the defendant or the victim." (*Ibid.*) That is, "a lewd or lascivious act can occur through the victim's clothing and can involve 'any part' of the victim's body." (*Ibid.*) Any touching of an underage child committed for purpose of sexual arousal is "lewd or lascivious," and satisfies the statutory requirement. (*Id*. at pp. 444-446, 452.)

K. testified that while she was swimming in the pool, wearing a two-piece bathing suit, defendant swam under water and moved her bathing suit bottom to look at her vagina. She testified, "I could feel him hook his finger under the – under the band of my bathing suit and move it over."

It was reasonable for the jury to infer from K.'s testimony that defendant touched her. Bathing suits fit close to the skin, with elasticized bands to keep them in place. When wet, as this one would have been because K. was in the pool at the time, they cling to the body. K. felt defendant hook his finger under the band of the suit and move it to expose her vagina to him. Defendant testified he had large hands, too large to fit under K.'s T-shirt. It was reasonable for the jury to infer that defendant, particularly with his large hands, could not have moved K.'s bathing suit bottom without simultaneously touching her. K.'s testimony and the reasonable inferences therefrom are sufficient evidence to support the conviction.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
MAURO, Acting P. J.

/s/
DUARTE, J.